Supreme Court, U.S.
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No. 00-452

In the Supreme Court of the United States

MARGARET BOYAJIAN, ET AL., PETITIONERS,

v.

THOMAS GATZUNIS, ET AL., RESPONDENTS.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Establishment Clause permits a State to enact a law protecting a variety of sometimes unpopular land uses — including schools, agriculture, child care centers, homes for the disabled, solar energy facilities, certain antennae, and houses of religious worship — from exclusionary zoning by local officials.

RULES 29.6 AND 14.1 STATEMENT

Respondent Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints has no parent corporation and issues no stock.

Petitioners are Margaret Boyajian, Charles Counselman, and Jean Dickinson.

Respondents are:

Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints;

Thomas Gatzunis

John W. Gahan III

William D. Chin

Thomas P. Callahan, Jr.

Carlo Tagariello

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BRIEF FOR RESPONDENTS IN OPPOSITION

This case involves an Establishment Clause chalienge to a provision of Massachusetts law that protects a variety of sometimes unpopular land uses from exclusionary zoning, and to a local zoning ordinance that permits religious uses within residential zones. The District Court and the Court of Appeals upheld these provisions. Respondents believe those decisions should not be disturbed and thus respectfully request that the Court deny the petition for certiorari.

STATEMENT OF THE CASE

A. The Church Seeks Approval To Build A Temple In The Town Of Belmont

In 1979, respondent Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints ("Church" or "LDS Church")[1] acquired an 8.9-acre lot in a residentially-zoned area in the Town of Belmont, Massachusetts. The lot borders a residential neighborhood on the south and the frontage road of Massachusetts Route 2 — one of Boston's major highways — on the north. See http://www.bostontemple.org/directions/index.html; Pet. App. 53a. The Church has conducted religious services at a meetinghouse on the property since the mid-1980s.

In 1995, the President of the Church announced a decision to construct a temple on the property (hereinafter, "the Boston Temple" or "the Temple"). In LDS religious doctrine, temples are distinct in structure and function from more typical Church meetinghouses. For instance, there are roughly 100 temples worldwide, compared with more than 11,000 Church meetinghouses. Pet. App. 2a, 68a. In addition, temples and their grounds

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[1] Corporation of the Presiding Bishop of The Church of Jesus Christ of Latter-day Saints is a religious corporation sole organized under the laws of the State of Utah for the purpose of holding assets and conducting the temporal affairs of The Church of Jesus Christ of Latter-day Saints, an unincorporated religious association. For purposes of this brief, we will not distinguish between these two entities.

are not used for conventions, revivals, day care, fund-raisers, parties, sporting events, or even Sunday congregational worship. *Id.* at 68a. They are constructed exclusively for the performance of the most sacred ceremonies in the LDS faith by the Church's most devout members. *Id.* at 2a, 68a. Thus, unlike cathedrals and comparably large houses of worship in other denominations, LDS temples typically are not used for large-scale services for multitudes of worshipers and the general public, but rather for smaller sacramental services, conducted in separate rooms and limited to faithful Church members. *Id.* at 68a-69a. Church members believe that the design and location of temples are revealed by God to the presidency of the Church, whom members sustain as prophets and apostles. *Id.* at 68a-70a. The Boston Temple is intended to serve LDS believers from all over New England.

Under the governing Massachusetts law (known as "the Dover Amendment"), as well as both the Belmont, Massachusetts Zoning Bylaw ("Bylaw") and its predecessor, religious uses are permitted in areas zoned for residential uses without need for case-by-case authorization by zoning officials. Such buildings must comply with all generally applicable land-use restrictions governing the size, placement, and height of structures, as well as health and safety, noise, historic preservation, environmental, parking, lighting, nuisance, fire, and other regulations and laws. Pet. App. 11a, 44a, 72a. It is undisputed that the Temple, both as originally proposed and as ultimately constructed, is in compliance with all such laws, with the exception of the height of its proposed steeple, discussed below. *Id.* at 91a. As originally proposed, the Temple would have had a surface area of 94,100 square feet. Because of the unusually large size of the lot, *any* landowner would have had an "absolute right," under unchallenged portions of the Bylaw, to build a house (or any number of other buildings) of that size on the property. *Id.* at 92a.

In May 1996, the Church applied to the Town's Board of Appeals ("Board") for a special permit to exceed the height limit

for the construction of six spires or steeples. From the outset, a few individuals — including but not limited to residents of the neighborhood — vigorously opposed the Temple on every conceivable ground at numerous public hearings. Pet. App. 55a, 58a, 66a-67a, 72a-74a, 81a-82a.

The Board ultimately rejected their arguments and voted to approve the special permit. Pet. App. 57a. In a gesture of good will, however, the Church asked the Board to postpone issuance of its written decision while it considered ways that it might accommodate some of the opponents' concerns. *Id.* at 3a, 52a, 86a-88a.

In February 1997, the Church filed an amended plan for the Temple that reduced its surface area by 30%, from 94,100 to 68,000 square feet, and eliminated five of its six spires. Pet. App. 3a, 52a, 92a. As before, the proposal complied with the Bylaw's requirements in every respect except for the proposed height of the single remaining steeple. *Id.* at 91a. The Church made numerous other voluntary concessions, including the routing of all temple traffic through a single frontage road entrance, eliminating any entry through the abutting residential neighborhood. *Id.* at 3a, 87a-88a, 98a. The plan further contemplated that the Temple would be set back from abutters by more than 300 feet, except in one instance where the setback would be 165 feet. *Id.* at 3a, 74a, 77a, 95a. These distances are well in excess of the setback required by the Bylaw.

Although a few individuals (including petitioners) remained opposed to the Temple's construction, in March 1997 the Board, acting unanimously, granted a special permit for construction of a steeple that would exceed the height limit. Pet. App. 95a-96a. The Board expressly found that the Church's proposal "complie[d] with both the letter and the spirit of the Bylaw." *Id.* at 94a. Respondent Thomas Gatzunis, the Town's building inspector, subsequently issued the Church a building permit. Pet. App. 33a.

B. The Construction Of The Temple And The Subsequent Filing Of This Lawsuit

Construction of the Temple began in July 1997. C.A. App. 77. In August 1998 — seventeen months after final approval of the amended plan, thirteen months after construction had begun, and well after significant progress had been made — petitioners filed this suit in federal court, challenging the facial constitutionality of the state and local zoning laws under which the Temple was authorized. They did not seek to enjoin further construction of the Temple pending resolution of their claims, and the legality of the Church's building permit has never been challenged. Accordingly, construction of the Temple, without a spire,[2] was completed in the summer of 2000. See Michael Paulson, *A Visible Faith for Mormon Church, Opening of Temple on Hill in Belmont Is Fulfillment of Dream, 'Reminder to the World,'* BOSTON GLOBE, Aug. 27, 2000, at A1.

After a month-long open house in September 2000, when thousands of visitors toured its interior, the Boston Temple was dedicated to God by the President of the Church and reserved solely for the quiet worship of faithful Church members.[3] After touring the facility, Senator Edward Kennedy described it as "magnificent." See Brian MacQuarrie, *Old Rivals Tour Mormon*

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[2] In separate state court litigation, petitioner Margaret Boyajian and other opponents of the Temple have challenged the Board's decision to grant a special permit for construction of the steeple. See *Martin v. Board of Appeals of Town of Belmont*, No. SJC-08398 (pending before Massachusetts Supreme Judicial Court). Pending resolution of that litigation, the Temple remains without a spire. That issue is not raised here.

[3] The suggestion (Pet. 5) that 100,000 people will visit the Temple annually is false. The open house attracted tens of thousands of visitors interested in touring the Temple before it closed to the public. The Temple is now open only to faithful members.

Temple: Kennedy, Romney Offer Warm Praise, BOSTON GLOBE, Sept. 9, 2000, at B1. Counsel for petitioners has announced that in the event the Court grants review and overturns the decision below, they will seek to have the Temple torn down. See Lisa Lipman, *Mormons Face Tempest in a Temple: Angry Suburban Boston Neighbors Want $30 Million Structure Razed*, CHI. TRIB., Sept. 29, 2000, at 8.

C. The Dover Amendment

The Dover Amendment (Mass. Gen. Laws ch. 40A § 3)[4] declares, as a matter of state law, that certain land uses that are important to the people of the Commonwealth — but potentially unpopular in certain areas "because of local prejudice unrelated to their compatibility with the essential nature of the existing community" — must be treated as permitted uses by local zoning ordinances. Pet. App. 12a. The Amendment was enacted in response to a notorious incident of religious discrimination in 1946, in which the Town of Dover, Massachusetts adopted a bylaw that banned religious schools from all residential neighborhoods. Four years later, the Massachusetts legislature passed "An Act Prohibiting Discriminatory Zoning By-Laws and Ordinances." See Mass. Gen. Laws ch. 40 § 25 (1950). The original version of the Amendment represented the legislature's judgment that the best way to combat religious discrimination in zoning, which frequently is difficult to prove, is to eliminate case-by-case discretionary zoning decisions regarding religious land use, and to substitute a state-wide zoning law declaring religious uses permissible in every district. Pet. App. 17a.

Since 1950, the Dover Amendment has been broadened many times to withhold local zoning authority over vulnerable land uses. Pet. App. 6a, 38a. The Amendment now precludes

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[4] For the convenience of the Court, we have reproduced the relevant state law provision, Mass. Gen. Laws ch. 40A § 3, in its entirety. See App., *infra*, 1a-4a.

or limits zoning laws that ban not only religious uses, but also nonprofit educational uses (whether secular or religious); child care centers; accommodations for physically handicapped people; agricultural, horticultural, floricultural, and viticultural uses; "facilities for the sale of produce, and wine and dairy products"; "solar energy systems or the building of structures that facilitate the collection of solar energy"; and antenna structures, to name a few. Mass. Gen. Laws ch. 40A § 3; Pet. App. 6a, 7a n.2. Thus, while the Dover Amendment "originally provided anti-discrimination protection only for uses of land for religious purposes," it "currently includes protection for a number of nonreligious uses * * * as well." Pet. App. 38a. See also *id.* at 40a ("the Dover Amendment currently provides the exemption to a broad class of land uses"). Numerous parties who use their property for nonreligious purposes have successfully invoked the Dover Amendment's protections.[5]

The Dover Amendment does not preempt most forms of land use regulation, but only shields protected uses from categorical exclusion by local authorities. Such uses remain subject to "reasonable [local] regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." Mass. Gen. Laws ch. 40A § 3. Nor does the Amendment preempt state nuisance law. Thus, contrary to petitioners (Pet. 2), those who seek to use their property for a protected use cannot simply build whatever they want regardless of the impact on neighbors. The Amendment prevents outright exclusion of various uses from municipal zones, but as the Court of Appeals observed, it "does not exempt religious property uses from substantial standard

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[5] See, *e.g.*, *Rogers* v. *Town of Norfolk*, 734 N.E.2d 1143 (Mass. 2000) (child care center); *Watros* v. *Greater Lynn Mental Health & Retardation Ass'n, Inc.*, 653 N.E.2d 589 (Mass. 1995) (shelter for mentally handicapped persons); *City of Worcester* v. *New England Institute*, 140 N.E.2d 470 (Mass. 1957) (business school).

zoning requirements that are designed to ensure compatible uses of land." Pet. App. 11a. See also *id.* at 44a (rejecting claims that the Amendment "'removes any type of real local zoning control of religious sites'" and "'prevents municipalities from imposing any conditions other than those permitted by [the Amendment]'"). Massachusetts courts have repeatedly upheld the application of local land-use requirements to property that is otherwise entitled to the Dover Amendment's protections. See, *e.g.*, *Trustees of Tufts College* v. *City of Medford*, 616 N.E.2d 433 (Mass. 1993) (dimensional, setback, and loading space requirements); *Radcliffe College* v. *City of Cambridge*, 215 N.E.2d 892 (Mass. 1966) (parking); *Southern New England Conference Ass'n of Seventh-Day Adventists* v. *Town of Burlington*, 490 N.E.2d 451 (Mass. App. Ct. 1986) (wetland protection); cf. *Community of Jesus, Inc.* v. *Cape Cod Comm'n*, Civ. A. No. 92-341 (Barnstable Super. Ct. Feb. 11, 1993) (sustaining application of architectural preservation laws).[6]

D. The Belmont Bylaw

Petitioners also challenge Belmont's Zoning Bylaw, which allows religious and educational uses in all town zones, subject to a series of generally applicable land-use regulations. Ever since 1925, when Belmont enacted its first zoning ordinance, schools and religious uses have been permitted to locate in areas zoned for residential use. Pet. App. 21a. In this respect, Belmont's Bylaw has always resembled local land-use policies nationwide, which commonly treat religious uses as compatible with residential areas. See 2 WILLIAM W. BASSETT, RELIGIOUS

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[6] The Supreme Judicial Court of Massachusetts has interpreted the Dover Amendment's preservation of "reasonable regulations" to mean that a local land-use provision "may be enforced, so long as the provision is shown to be related to a legitimate municipal concern." *Trustees of Tufts College*, 616 N.E.2d at 438. In addition, the challenger "bear[s] the burden of proving that the local requirements are unreasonable as applied to its proposed project." *Id.* at 438-439.

ORGANIZATIONS AND THE LAW § 10:15 (1997) ("The majority of jurisdictions hold that *Churches may not be excluded from residential areas*, either on First Amendment freedom of religion and assembly grounds, or on grounds that municipalities do not have authority under state enabling acts (*ultra vires*) to exclude churches as contrary to community health, safety, morals or general welfare"); accord 74 A.L.R.2d 377 § 2 (1960) (noting the "[g]eneral rule that churches cannot be absolutely excluded from residential area[s]"); KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 12.22, at 578 (4th ed. 1996). In 1978, Belmont made a technical amendment to its Bylaw to define religious and educational uses by reference to state law. The Bylaw's use table now notes that religious and educational uses are "exempted from prohibition by [the Dover Amend-ment]." C.A. App. 112.

E. Proceedings Below

On cross-motions for summary judgment, the District Court applied the familiar analysis of *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), and held that the Dover Amendment and the Bylaw do not violate the Establishment Clause. First, observing that the Amendment protects "a broad class of land uses" that "have historically generated discriminatory land use regulation," the court reasoned that it serves the "secular purpose" of shielding such uses from "the prejudices of local governments and certain of their constituencies." Pet. App. 38a, 40a, 42a. Likewise, the court explained, the Bylaw seeks both to advance secular land-use planning interests and to bring local law into conformity with state zoning provisions. *Id.* at 42a-43a.

Second, noting that the Dover Amendment and the Bylaw "exempt religiou[s] as well as certain nonreligious land uses" from exclusionary zoning, the court reasoned that the provisions at issue do not "'establis[h]' religion within the meaning of the First Amendment any more than * * * the property tax exemption [upheld] in *Walz* [v. *Tax Commission*, 397 U.S. 664

(1970)]." Pet. App. 44a. Rather, the provisions merely have the effect of "reduc[ing] discrimination by local governments." *Ibid.* The court also rejected claims that the Dover Amendment "'removes any type of real local zoning control of religious sites,'" stating that it "plainly subjects religious land uses to 'reasonable regulations.'" *Ibid.*[7]

The Court of Appeals affirmed. Writing for the court, Judge Coffin began by noting that it was undisputed that the Dover Amendment was designed "to prevent religious discrimination." Pet. App. 9a. "Prohibition of religious discrimination," the court explained, "is unquestionably an appropriate, secular legislative purpose." *Ibid.* The court further found that the Amendment and the Bylaw advance secular land use goals, observing that both provisions reflect a "secular judgment that religious institutions, by their nature, are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood." *Id.* at 17a.

Turning to *Lemon*'s effects prong, the court flatly rejected petitioners' "depiction of the statute as an impermissible legal hammer wielded in favor of religion." Pet. App. 10a. Given that the Dover Amendment provides that "a religious institution, no less than any other group, must comply with reasonable regulations designed to preserve a comfortable, desirable community," the court held that such a characterization "grossly exaggerates the reach of the statute." *Id.* at 10a, 11a.

The court went on to explain that the Dover Amendment fell squarely within a long line of precedent holding "that religious entities may be the beneficiaries of laws that, for secular reasons, provide benefits to a variety of groups." Pet. App. 12a. "While the original Dover Amendment was directed solely at religious uses of property," the court stated, "the provision now

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[7] Petitioners have never contended that the Dover Amendment violates the "entanglement" prong of the *Lemon* test.

includes a variety of uses linked together by the legislature's apparent judgment that these uses, though important to all communities, would be at risk of exclusion from certain zoning areas because of local prejudice unrelated to their compatibility with the essential nature of the existing community." *Id.* at 11a-12a. As the court reasoned:

> In protecting religious, educational, agricultural and the other listed uses of property from exclusion — whether resulting from discrimination or simply from a general aversion to change in the neighborhood — Massachusetts evidences "an affirmative policy that considers these groups as beneficial and stabilizing influences in community life," wherever they are located. The Supreme Court has time and again made it clear that to include religion in such a category is not to advance religion in contravention of the Establishment Clause. The collection of favored uses in the Dover Amendment is amply diverse in the context of zoning to support such a determination.

Pet. App. 12a-13a (quoting *Walz*, 397 U.S. at 673). The court thus concluded that "[b]y protecting religious uses of land among others that are favored by communities generally, but that may encounter particular neighborhood disfavor, the Dover Amendment does not itself advance religion but clears the way so that churches themselves may do so." *Id.* at 20a. In sum, the Amendment "does not constitute a fostering of, or favoritism toward, religion over non-religion." *Id.* at 17a.[8]

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[8] While unnecessary to its decision, the Court of Appeals went on to state that it would uphold the challenged provisions even if they were limited "exclusively to religious organizations." Pet. App. 13a. Quoting this Court's holding in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 338 (1987), that when "government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, [there is] no reason to require that the exemption come packaged with benefits to secular entities," the court explained:

Chief Judge Torruella dissented, but openly acknowledged his basic "agreement with the majority as to the legal standards which * * * apply to this case." Pet. App. 22a. The majority and dissent thus differed only in their view of the "application of those standards" to the particular facts of this case. *Ibid.*

On June 22, 2000, the Court of Appeals unanimously denied the petition for rehearing and rehearing en banc. Pet. App. 49a-50a. This petition followed.

REASONS FOR DENYING THE PETITION

The petition for certiorari rests on the claim that the Dover Amendment and Belmont Bylaw single out religious land use for special and extraordinary treatment that is unavailable to nonreligious land uses. Petitioners assert that the challenged provisions provide "a special and unconstitutional benefit for religion." Pet. 16. Using various terminology, they claim that the Dover Amendment is "a *sui generis* law aiding religion," a "sweeping benefit for all religious purposes," and "a classic instance of the government preferring 'religion over nonreligion.'" *Id.* at 3 n.1, 16-17, 18. They further say that the law "subjugates

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> Massachusetts' effort to eliminate local zoning discrimination is fully in line with the [Supreme] Court's approval of government actions aimed at lifting burdens from the exercise of religion. Not only was the Dover Amendment at its origin a defensible response to an actual incident of discrimination, but [in light of evidence of ongoing problems of religious discrimination in zoning] protections against land use bias continue to be supportable fifty years later.

Id. at 14a. Contrary to petitioners' implication (Pet. 6), however, the Court of Appeals' analysis of whether these provisions would constitute a permissible accommodation if limited to religious uses was not a necessary or principal part of its holding. Remarkably, petitioners utterly fail to mention the Court's analysis of the breadth of the provisions at issue.

community self-determination" by "exempt[ing] all religious organizations and individuals from zoning restrictions." *Id.* at 9, 15.

As the Court of Appeals observed, petitioners' "depiction of the statute as an impermissible legal hammer wielded in favor of religion both grossly exaggerates the reach of the statute and understates the recognition that religion may be given consistent with the Establishment Clause." Pet. App. 10a-11a. "As for the statute's scope," the court stated, "it does not exempt religious property uses from substantial standard zoning requirements that are designed to ensure compatible uses of land." *Id.* at 11a. And "[a]s for the statute's assertedly improper focus on religion, plaintiffs err in two respects: the statute does not benefit only religious uses, and even if it did, such unique treatment can withstand constitutional scrutiny." *Ibid.*

The petition thus reflects little more than petitioners' disagreement with the two lower courts over their interpretation of the Dover Amendment and the Belmont Bylaw. Even the dissenting judge on the panel acknowledged that this case does not raise any serious issue about the proper "legal standards" applicable to zoning of religious uses, but is merely an argument about the "application of those standards" to the particular facts of this case. Pet. App. 22a (Torruella, C.J., dissenting). It would thus be inappropriate to use this Court's certiorari jurisdiction to review the Court of Appeals' interpretation of the scope of this unique Massachusetts statute.

Petitioners candidly admit that "there is no split between the circuits" (Pet. 14), and they cite three appellate decisions that are in accord with the decision below. *Id.* at 12. They do not claim that the decision below is in conflict with any decision of this Court. Indeed, they acknowledge (at 14) that the lower courts have uniformly concluded that laws of the sort challenged here are valid under the authority of *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), and *Corporation of Presiding Bishop* v. *Amos*,

483 U.S. 327 (1987). Although they attempt to portray the issues as having recurring significance, they conceded below that "this case *is the first to address this type of zoning favoritism for religious uses*." Rehearing Pet. 10 (emphasis added). Nor do petitioners claim that the Massachusetts statute is typical of legislation elsewhere (and it is not). The case thus fails to satisfy any of the criteria for certiorari under Rule 10.

What is more, several justiciability and prudential concerns make this case a poor vehicle for resolving the question presented. Even if petitioners were correct about the validity of the Dover Amendment and the Belmont Bylaw, it is far from clear that their alleged injury would be redressible, in light of several adequate and independent grounds for denying relief under Massachusetts law. The challenge to the statutes was brought late — 17 months after the decision under attack, and more than a year after construction work had begun — and the Temple is now complete and in use. Moreover, even if the case had been timely filed, and even if the laws at issue were invalidated, the same result would have occurred under the prior law, which petitioners do not attempt to argue is invalid. The Petition thus amounts to a request for an advisory opinion that the Dover Amendment and Belmont Bylaw are facially unconstitutional.

A. The Petition Rests On A Fundamental Mischaracterization Of The Statutes.

Petitioners' central theme is that the Dover Amendment and the Belmont Bylaw grant religion — and religion alone — a "total exemption from zoning requirements." Pet. 14. Indeed, they say that these laws grant religious landowners "unilateral power" to decide "whether a neighborhood [is] livable." *Id.* at 2.

This argument badly misrepresents the statutory scheme in two critical respects. *First*, it ignores the fact that the Dover Amendment protects a wide range of nonreligious uses, as well as religious uses, from exclusionary local zoning. For example,

the Amendment precludes or limits local zoning laws that interfere with the use of land for "educational purposes," for any "child care facility," for "congregate living arrangements among non-related persons with disabilities," for "agriculture, horticulture, floriculture, or viticulture," for "facilities for the sale of produce, and wine and dairy products," for "structures that facilitate the collection of solar energy," and for certain "antenna structure[s]." Mass. Gen. Laws ch. 40A § 3. Thus, as both of the courts below recognized, "[w]hile the original Dover Amendment was directed solely at religious uses of property, the provision now includes a variety of uses linked together by the legislature's apparent judgment that these uses, though important to all communities, would be at risk of exclusion from certain zoning areas because of local prejudice unrelated to their compatibility with the essential nature of the existing community." Pet. App. 12a; accord *id.* at 38a (the Dover Amendment "currently includes protection for a number of nonreligious uses").

That the Dover Amendment protects various nonreligious as well as religious land uses is confirmed by Massachusetts case law. Earlier this year in *Rogers* v. *Town of Norfolk*, 734 N.E.2d 1143, 1150 (Mass. 2000), for example, a landowner successfully invoked the Amendment against a municipality that attempted to prevent her from adapting a residence for use as a secular child care facility. Accord *Petrucci* v. *Board of Appeals*, 702 N.E.2d 47, 50 (Mass. App. Ct. 1998). Similarly, *Watros* v. *Greater Lynn Mental Health & Retardation Ass'n, Inc.*, 653 N.E.2d 589, 593 (Mass. 1995), held that the Amendment barred a municipality from excluding shelters for mentally handicapped adults. And *City of Worcester* v. *New England Institute*, 140 N.E.2d 470, 472 (Mass. 1957), extended the Amendment's protection of "public, religious, sectarian or denominational" schools to private secular schools, reasoning that all schools serve a public "educational purpose." In sum, numerous parties who use their land for secular purposes have succeeded in

invoking the Dover Amendment's prohibition of exclusionary zoning.

Moreover, when viewed together with the Bylaw, the practical effect of the Dover Amendment is to place protected uses on the same footing as other uses deemed appropriate for particular zones under the local zoning plan. Agricultural uses, detached single-family dwellings, municipal recreational uses (*e.g.*, parks, golf courses, baseball diamonds, swimming pools), and accessory uses such as greenhouses and tennis courts, to name a few, are permitted as of right to locate in residentially zoned areas in Belmont. See C.A. App. 111-114 (Bylaw § 3.3). The treatment accorded to churches, schools, and the other uses listed in the Amendment is precisely the same as that accorded these other permitted uses. This utterly refutes the notion that religious uses are singled out for extraordinary benefit.[9]

Second, petitioners' claim ignores the extent to which land uses protected by the Dover Amendment are subject to generally applicable land-use regulations. Petitioners assert that the Amendment gives religious landowners the power "to trump local community zoning laws" on issues like "noise, intrusive lighting, traffic congestion, and drainage problems." Pet. 11, 12. But as the Amendment plainly states, "such land or structures may be subject to reasonable regulations concerning the bulk and height of structures and determining yard sizes, lot area, setbacks, open space, parking and building coverage requirements." Mass. Gen. Laws ch. 40A § 3. As the decision below explains, the Amendment merely preempts exclusionary zoning and "does not exempt religious property uses from substantial standard zoning requirements that are designed to ensure

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[9] Petitioners' suggestion that a "philosophical bookstore" (Pet. 18) would not be entitled to protection under the Dover Amendment is not the least bit troubling. The zoning ordinances of virtually every community distinguish noncommercial and commercial uses, and the latter are frequently excluded from residential areas.

compatible uses of land." Pet. App. 11a. See also *ibid.* ("a religious institution, no less than any other group, must comply with reasonable regulations designed to preserve a comfortable, desirable community)."

The First Circuit's interpretation of the law is confirmed by numerous Massachusetts state court decisions. In *Trustees of Tufts College*, for example, the Supreme Judicial Court held that a local land-use provision "may be enforced, so long as [it] is shown to be related to a legitimate municipal concern," and that the challenger "bear[s] the burden of proving that the local requirements are unreasonable as applied to its proposed project." 616 N.E.2d at 438-439. Applying these standards, the courts have required otherwise protected uses to satisfy an array of local mandates, including dimensional, setback, and loading space requirements (*ibid.*), parking regulations (*Radcliffe College* v. *City of Cambridge*, 215 N.E.2d 892 (Mass. 1966)), environmental provisions (*Southern New England Conference Ass'n of Seventh-Day Adventists* v. *Town of Burlington*, 490 N.E.2d 451 (Mass. App. Ct. 1986)), and regulations designed to preserve the architectural and historical character of the community (*Community of Jesus, Inc.* v. *Cape Cod Comm'n*, Civ. A. No. 92-341 (Barnstable Super. Ct. Feb. 11, 1993)). The Amendment "strike[s] a balance between preventing local discrimination against [a protected] use * * * and honoring legitimate municipal concerns that typically find expression in local zoning laws." *Trustees of Tufts College*, 616 N.E.2d at 437-438. As a review of the record attests, the Church here was subject to an extensive array of land use regulations. Petitioners' assertion that religious landowners are given "carte blanche" in zoning (Pet. 14) is therefore without merit.

In the end, it turns out that the question presented — whether a state may "exempt all religious organizations and individuals from zoning restrictions" (Pet. 9) — is not really presented at all. As the courts below held, the protections of the Amendment extend "to a broad class of land uses" (Pet. App. 40a), and those

uses remain subject to reasonable land use regulation. But even if petitioners' "grossly exaggerate[d]" (Pet. App. 10a) depiction of the statute were not belied by its plain language as well as Massachusetts case law, it would make little sense for this Court to review a decision where the real dispute is over the scope and meaning of a unique state law.

B. The Petition Amounts To A Request For An Advisory Opinion.

Quite apart from the fact that the question as framed by the petitioners is not presented by these facts, several adequate and independent state grounds make it doubtful that petitioners could obtain any relief even if they succeeded on the merits of their facial challenge to the provisions at issue. The petition is, in effect, a request for an advisory opinion.

First, petitioners waited to file suit until 17 months after the Board's authorization of a building permit, which is the decision under attack. By that time, construction on the Temple had been underway for more than a year. But even at that late juncture, petitioners never moved for interim relief. Accordingly, work on the Temple proceeded, and the building is now complete, has been dedicated, and is in use. Under Massachusetts doctrines of estoppel and laches, therefore, relief is not available.

In the classic case of *Green* v. *Richmond*, 29 N.E. 770, 770 (Mass. 1892), the Supreme Judicial Court held that injunctive relief "will not be issued * * * when it appears that there has been unreasonable delay by the party seeking it" or when it "would subject the other party to great inconvenience and loss." Even in cases where the defendant's construction project has physically encroached on the plaintiff's property, Massachusetts courts have frequently denied injunctive relief to plaintiffs who stood by without objecting while the defendant built the offending structure, or where restoring the property to its prior condition would impose a great hardship upon the defendant. See, *e.g.*, *Loughlin* v. *Wright Mach. Co.*, 173 N.E. 534, 535

(Mass. 1930); *Lynch* v. *Union Inst. for Sav.*, 34 N.E. 364, 365 (Mass. 1893); *Levi* v. *Worcester C.S. Ry.*, 78 N.E. 853, 854 (Mass. 1906); see also *Davenport* v. *Broadhurst*, 406 N.E.2d 1030, 1034 (Mass. App. Ct. 1980) (doctrine of laches "may save a defendant from the expense of removing a structure built on another's land"); 28 A.L.R.2d 679 § 11 (1953) ("The right of a plaintiff to a mandatory injunction for the removal of an encroachment by an adjoining landowner may be defeated by acquiescence, delay, or laches"). As one leading commentator illustrates:

> X begins building a garage while N, a neighbor, stands by watching. N makes no objection, but when X completes the job, N says politely, "I think you have built the garage on my land." He then orders a survey and finds that it is indeed so. N then sues in equity to force removal of the offending structure. Almost certainly relief will be denied for one reason or another.

DAN B. DOBBS, REMEDIES § 2.3, at 42 (1973). See also *id.* § 5.7, at 360 ("Certainly the plaintiff who stands by and makes no protest as a large factory is built next door has the 'equities' against him and an injunction is apt to be denied in such cases under doctrines of laches or estoppel"); *id.* § 2.3, at 42 n.12 ("Even if N never knew of the activity and could not be estopped, courts might deny relief on a balancing of hardships").

These cases are consistent with federal remedial principles in Establishment Clause cases. *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) ("*Lemon II*"), is instructive in this regard. There the Court addressed the validity of a lower court's refusal to enjoin payments to religious schools for educational services provided prior to *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) ("*Lemon I*"), which invalidated such payments. Noting that "reliance interests weigh heavily in the shaping of an appropriate equitable remedy," the Court held that two main factors — "the expenses incurred by the schools in reliance on the state statute," and the

plaintiffs' "choice not to press for interim injunctive [relief]" — made it inequitable to enjoin payment for services provided prior to the Court's ruling in *Lemon I*. See 411 U.S. at 203, 204.

Although some modern Massachusetts cases have relaxed the principle of laches in cases where construction encroached on another person's property,[10] there is no authority for requiring a landowner to raze a building that rests entirely on his own property and complies with governing land-use rules. Such relief would encourage vexatious and unreasonable litigation tactics. The Church has incurred substantial expense in reliance upon the statute, which has existed for 50 years and has been enforced on behalf of other religious property owners. See, *e.g.*, *Sisters of Holy Cross* v. *Town of Brookline*, 198 N.E.2d 624 (Mass. 1964); *The Bible Speaks* v. *Board of Appeals*, 391 N.E.2d 279 (Mass. App. Ct. 1979). To permit petitioners to have the Temple torn down at this late stage would turn "the practical realities of the situation" on their head (*Lemon II*, 411 U.S. at 205) and impose a great hardship on respondents.[11] Such inequitable relief is simply not available under Massachusetts law.

Second, it is well settled under Massachusetts law that where a court invalidates a statutory amendment such as the provisions challenged here, the effect is to resurrect the law as it existed prior to amendment. See *Opinion of the Justices*, 168 N.E. 536, 538 (Mass. 1929) (noting that "when a statute whereby an attempt has been made to amend previously existing statutes has been declared unconstitutional, the previously existing statutes survive untarnished"); *Commonwealth* v. *Gagnon*, 443 N.E.2d 407, 408 & n.2 (Mass. 1982) (invalidation of severable

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[10] See, *e.g.*, *Peters* v. *Archambault*, 278 N.E.2d 729, 730 (Mass. 1972).

[11] Other than removal of the offending structure, petitioners have not specified any relief to which they might be entitled.

amendment to statute "serve[s] to validate the prior statute"). Upon invalidating amendments to local zoning provisions, several Massachusetts courts have invoked this principle and enforced prior versions of those statutes. See *Beal* v. *Building Comm'r*, 234 N.E.2d 299, 300 (Mass. 1968) (enforcing zoning ordinance "as it existed * * * prior to the amendment"); accord *Mitchell* v. *Board of Selectmen*, 190 N.E.2d 681, 683 (Mass. 1963); *Cross* v. *Planning Bd.*, 189 N.E.2d 189, 190-191 (Mass. 1963).

If this Court were to strike down the challenged provisions, therefore, the applicable law would be the Belmont bylaw that was in effect before it was "amended to reflect the requirements of the Dover Amendment." Pet. App. 21a. Like the zoning ordinances of so many communities across the nation, the prior bylaw permitted religious uses to locate in any residential zone. *Ibid.* Petitioners do not claim that it is unconstitutional to allow churches as permitted uses in residential areas. Accordingly, even if this Court were to review and reverse the decision below, the Church would still be entitled to a building permit, and nothing would be changed.

In light of the obstacles to relief under state law, the petition fails to present a justiciable controversy. As this Court stated in *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983), where "the same judgment would be rendered" after the Court "corrected [the lower court's decision]," review "amount[s] to nothing more than an advisory opinion." See *Hewitt* v. *Helms*, 482 U.S. 755, 761 (1987) ("The real value of the judicial pronouncement — what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion — is in the settling of some dispute which affects the behavior of the defendant towards the plaintiff"). Such is the case here.

If the issue of religious land use is worthy of this Court's consideration, there will be ample opportunity to address it in the context of a real case or controversy. There is no need for

the Court to spend its time on a case that, upon full examination, is likely to prove nonjusticiable.

C. The Petition Fails To Satisfy Any Of The Traditional Criteria For Certiorari Review.

Even setting the foregoing problems aside, petitioners fail to satisfy this Court's criteria for granting review. They assert (at 13) that the issue presented "has been percolating in the lower courts for years," but concede that "there is no split between the circuits." Pet. 14. Nor do petitioners claim a conflict between the decision below and any decision of this Court. To the contrary, they candidly acknowledge (at 14) that the lower courts have uniformly concluded that statutes of this sort are consistent with the Court's holdings in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), and *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987).[12] Citing a string of newspaper articles and inapposite cases, petitioners endeavor to create the impression that factual scenarios like this recur daily across the nation. But they conceded below that "this case *is the first to address this type of zoning favoritism for religious uses*." Rehearing Pet. 10.

A review of the cases cited by petitioners verifies that this is the first (and only) case of its kind. *Forest Hills Early Learning Center, Inc.* v. *Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988), involved the validity of a state *licensing* exemption for religious child care facilities. *Rector, Wardens, & Members of Vestry of St. Bartholomew's Church* v. *City of New York*, 914 F.2d 348 (2d Cir. 1990), involved a *free exercise* challenge to a historic preservation law. And the three other cases petitioners cite sustained laws that were far more targeted toward religion

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[12] Petitioners argue that "it makes little sense for this Court to await such a split [in the circuits]" because every lower court to consider the issue has come to the same conclusion. Pet. 14. This is a new idea: that uniformity among the circuits is a basis for granting certiorari.

— and thus, under their theory, far more problematic — than the laws at issue here. See *Ehlers-Renzi* v. *Connelly Sch. of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000) (upholding accommodation of religious schools); *Cohen* v. *City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993) (upholding accommodation of religious day care centers); *East Bay Asian Local Dev. Corp.* v. *State*, 81 Cal. Rptr. 2d 908 (Ct. App.), *review granted*, 977 P.2d 692 (Cal. 1999) (upholding accommodation in historic preservation law). Thus, even crediting petitioners' claim that these are comparable decisions, they merely confirm the correctness of the decision below.

The decision below lacks other hallmarks of certworthiness as well. Petitioners make no claim that other states have laws similar to the Dover Amendment, and they do not. No grave injustice has been done, and no matter of national importance is at stake. The Belmont Board of Appeals, which is the lawfully appointed representative of the people most directly involved, unanimously concluded that the Temple complies "with both the letter and spirit" of the Town's zoning laws. Pet. App. 94a. It is time to put this neighborhood disagreement to rest.

D. The Dover Amendment And The Bylaw Do Not Violate The Establishment Clause.

Finally, on the merits, there is no reason to disturb the careful and well-reasoned decision of the First Circuit. Indeed, beyond their rhetoric about giving "sweeping benefit[s]" to religion (Pet. 3 n.1) and "subjugat[ing] community self-determination" (*id.* at 15), petitioners have not suggested any coherent theory of the Establishment Clause under which the challenged provisions are unconstitutional. Surely they do not suggest that it is unconstitutional to treat religious uses as permitted uses in residential zoning areas. That would fly in the face of standard zoning practice and disrupt local zoning law all over the country. But it is equally untenable to think that religious uses may be permitted only on a discretionary case-by-case basis. That would

be an invitation to arbitrariness and unequal treatment. Nor do petitioners seem to believe that religious uses may not be addressed as such, or given special treatment, in land use law. Again, that would upset the settled practice of practically every jurisdiction in the country. In short, petitioners complain about the Massachusetts law, but they offer no theory about what sort of land use law would satisfy their understanding of the First Amendment.

The Court of Appeals' analysis, by contrast, is supported by a long line of this Court's precedents holding that government benefits made available to a class including both secular and religious beneficiaries do not violate the Establishment Clause.

In *Walz*, 397 U.S. at 673, the Court upheld a state property tax exemption made available to "a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups," among others. Noting that the state had not "singled out one particular church or religious group or even churches as such," the Court rejected the claim that it was unconstitutional to permit religious organizations to share in the benefit. *Ibid.* Insofar as "hostility toward religion has taken many shapes and forms," the Court explained, the challenged exemptions were "a reasonable and balanced attempt" to combat "latent dangers inherent in the imposition of property taxes." *Ibid.* Both before and since *Walz*, the Court has repeatedly affirmed the validity of laws that, for secular reasons, grant benefits to a range of religious and nonreligious beneficiaries. *E.g.*, *Bowen* v. *Kendrick*, 487 U.S. 589 (1988); *Mueller* v. *Allen*, 463 U.S. 388 (1983); *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989); *Everson* v. *Board of Educ.*, 330 U.S. 1 (1947).

The Dover Amendment and Belmont Bylaw fall squarely within this line of precedents. They do not "single out" religious groups for a benefit unavailable to others. Rather, religious land

use is merely one part of "a broad class of land uses" (Pet. App. 40a) — including schools, child care centers, accommodations for the disabled, agriculture, and solar energy, to name a few — that are protected from "latent dangers" of exclusionary zoning. Petitioners would have no more (and no less) right to object to the prospect of a farm, a noisy school playground, a municipal basketball court or swimming pool, or a child care facility than to the Temple (or any other church, synagogue, or mosque). See C.A. App. 111-114. In short, there can be no claim that these laws favor religion over nonreligion.

Petitioners say there is no "rhyme or reason" or "neutral and secular criterion" that explains the "grab bag" of uses protected by the Amendment. Pet. 3 n.1. But that is simply false. As the Court of Appeals explained, this "variety of uses" is "linked together by the legislature's apparent judgment that these uses, though important to all communities, would be at risk of exclusion from certain zoning areas because of local prejudice unrelated to their compatibility with the essential nature of the existing community." Pet. App. 12a. The Amendment thus serves to "preven[t] churches and nonreligious activities from being subjected to discrimination generated by the prejudices of local governments and certain of their constituencies." *Id.* at 38a.

Even where a statutory accommodation is limited to religion, it is well settled that "a claimant alleging 'gerrymander' must be able to show the *absence* of a neutral, secular basis for the lines government has drawn." *Gillette* v. *United States*, 401 U.S. 437, 452 (1971) (emphasis added). Petitioners have plainly failed to carry that burden here. The Amendment and Bylaw "represen[t] a secular judgment that religious institutions, by their nature, are compatible with every other type of land use and thus will not detract from the quality of life in any neighborhood." Pet. App. 17a. This judgment more than satisfies the "purpose" prong of *Lemon I*, 403 U.S. at 612. See *Mueller*, 463 U.S. at 394-395 (noting the Court's "reluctance to attribute unconstitutional

motives to the states" where some "plausible secular purpose" explains their actions).[13]

Petitioners concede that the antidiscriminatory purpose of the Dover Amendment was entirely legitimate. Pet. 10. They argue, however, that it was improper for Massachusetts to achieve this purpose by means of a ban on the exclusionary zoning of religious uses. They suggest that it would have been better to continue to allow discretionary case-by-case decisions about religious land use, subject to a law prohibiting overt discrimination. *Ibid.* According to them, the legislature "hastily overreacted to the Dover situation," and its chosen means of addressing discrimination against religious land use is "dramatically over-inclusive." *Id.* at 10, 3 n.1.

This argument disregards the realities of the situation. A governmental body faced with whether to allow religious uses

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[13] Even if the challenged provisions protected only religious uses, they would nonetheless withstand constitutional scrutiny. As this Court stated in *Amos*, 483 U.S. at 338, "[w]here * * * government acts with the proper purpose of lifting a regulation that burdens the exercise of religion, [there is] no reason to require that the exemption come packaged with benefits to secular entities." The provisions here not only relieve the burden on religious exercise imposed by discriminatory land use decisions; they avoid barriers to communal worship by ensuring that religious houses of worship are able to serve parishioners in every zone. As the Court of Appeals explained, "[b]y protecting religious uses of land among others that are favored by communities generally, but that may encounter particular neighborhood disfavor, the Dover Amendment does not itself advance religion but clears the way so that churches themselves may do so." Pet. App. 20a. This is plainly consistent with the requirements of the Establishment Clause. See *Amos*, 483 U.S. at 337 ("A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence").

in a residential area has limited options. It can forbid religious uses outright — an exceedingly uncommon option that no one (even petitioners) has advocated here. See pp. 7-8, *supra*. It can permit such uses on a case-by-case, "special permit" basis, based on the discretion of local zoning officials. Or it can permit them as a matter of right.[14]

Viewed against this backdrop, the advantage of permitting religious uses as a matter of right is obvious. Discretionary case-by-case judgments by local officials about which religious uses to permit are susceptible to unfairness as well as conscious or unconscious bias. *E.g.*, *Lubavitch Chabad House, Inc.* v. *City of Evanston*, 445 N.E.2d 343, 346-347 (Ill. App. Ct. 1982); see also Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 776-777 (1999). Because virtually any land use ruling can be justified on *some* ostensibly neutral ground, discrimination is difficult to detect and even more difficult to prove. It may not become clear that an adverse zoning decision is motivated by anti-religious bias until a pattern or practice has been revealed. By that time, a church may have suffered two, three, or more denials, at significant cost and with irreparable injury to its mission. Particularly in light of expert opinion and experience, which shows that religious uses are compatible with residential zones,[15] the legislature is entitled to

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[14] Petitioners do not suggest that governmental officials may not treat religious use as an independent land use category, as does virtually every municipality across the nation. It should go without saying that there are ample secular reasons for such a classification, ranging from aesthetic and architectural concerns to issues related to the assembly of large congregations and the needs of parishioners for a proximate place to worship.

[15] As one leading authority has explained:

> Usually, religious uses are specifically permitted in residential districts, including those confined primarily to single-family

reach the conclusion that a categorical rule regarding religious land use is the best solution to the problem.

Indeed, even apart from concerns about discrimination, a legislature might reasonably conclude that uses of a religious nature are generally compatible with the full range of zoning classifications. Churches on the street corner are a familiar sight in virtually every residential area, and steeples are a hallmark of the New England landscape. Even apart from their spiritual significance, houses of worship typically offer open space, architectural interest, and services (religious and otherwise) that are welcome to the local community.

Moreover, as a stroll past Trinity Church at Copley Square demonstrates, houses of worship are as compatible with Boston's commercial district as with the many residential neighborhoods across the state of Massachusetts. To the extent that *particular* types of religious use (*e.g.*, a religious convention hall) are incompatible with a neighborhood, such cases can be dealt with by application of generally applicable land-use restrictions. Thus, the Dover Amendment strikes a balance: it protects religious uses from arbitrary exclusion from any zone, but "moderate[s]" this protection with "the requirement that religious uses conform to the standard physical limitations imposed on all buildings located in that zone." Pet. App. 16a. As the First Circuit observed, this is a perfectly sensible way "to preserve a comfortable, desirable community." *Id.* at 11a.

> dwellings. * * * Religious uses serve people best when they are accessible to homes. Religious buildings provide convenient meeting places for youth groups and civic associations. This need can be filled best when the religious institution is convenient to the residents who attend. * * * The wide majority of courts hold that religious uses may not be excluded from residential districts.

2 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING § 12.22 (4th ed. 1996) (footnotes and citations omitted).

Nor is there anything suspect about the legislature's decision to enact a *statewide* solution to the problem of exclusionary zoning. Petitioners claim that the Dover Amendment interferes with "local self-determination" (Pet. 13), but the zoning power is, and always has been, constitutionally vested in the legislature of the Commonwealth of Massachusetts, which has plenary authority to delegate — or not to delegate — any portion of this power to the local level. See Mass. Const. Amend. art. 2, § 6; *Board of Appeals* v. *Housing Appeals Committee*, 294 N.E.2d 393, 409 (Mass. 1973) (holding that the legislature has "supreme power in zoning matters" that overrides zoning regulations "inconsistent with the constitution or laws enacted by the general court [*i.e.*, the legislature]"). It is unquestionably lawful, under state law, for the legislature to withhold "from all municipalities all power to limit the use of land" (*Attorney General* v. *Dover*, 100 N.E.2d 1, 3 (Mass. 1951) (upholding the Dover Amendment under the Massachusetts Constitution)), and the federal Constitution does not disturb this allocation of power. See *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178 (1907) (it "rests in the absolute discretion of the State" to "modify or withdraw" municipal powers).

In short, the judgment of the Court of Appeals was entirely consistent with this Court's interpretations of the Establishment Clause. Petitioners' preference for discretionary case-by-case determinations regarding religious land use would be far more injurious to the values of the First Amendment, by embroiling local officials in decisions about the relative value of different religious uses, with the attendant danger of bias and inequality.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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